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## ARTICLES

### **All Judicial Politics Are Local: The Political Trajectory of Judicial Reform in Haiti**

Louis-Alexandre Berg\*

#### I. INTRODUCTION

In January 2012, the Haitian justice system produced two significant but seemingly contradictory decisions. The first came on January 19 at the end of a highly publicized trial of police officers and prison guards. Eight officers were convicted of using unreasonable force in firing on inmates during a prison riot in the city of Les Cayes, soon after the massive earthquake that shook Haiti in January 2010. The court's decision was hailed as a "landmark moment for Haitian justice," and seen as an encouraging sign that the Haitian judiciary was asserting a newfound credibility in holding senior law enforcement officials accountable for human rights abuses.<sup>1</sup> Less than two weeks later, on January 27, an investigative judge dropped all charges against Jean-Claude Duvalier, the former president of Haiti accused of crimes against humanity, financial crimes, and embezzlement of public funds during his fifteen year reign from 1971 to 1986. For many human rights activists, as shocking as the decision itself was the judge's total disregard for Haiti's commitments under international law in ignoring well-established precedents that no statute of limitation

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1. Deborah Santag & Walt Bogdanich, *8 Guilty for Prison Massacre in Rare Trial of Haiti's Police*, N.Y. TIMES (Jan. 19, 2012), [http://www.nytimes.com/2012/01/20/world/americas/7-haitian-policemen-convicted-in-2011-les-cayes-prison-killings.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/01/20/world/americas/7-haitian-policemen-convicted-in-2011-les-cayes-prison-killings.html?pagewanted=all&_r=0) (quoting William O'Neill, an American human rights lawyer with decades of experience in Haiti).

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can be applied to gross human rights violations.<sup>2</sup> The decision was widely perceived as evidence of continued interference in judicial decisions by an executive branch friendly to the former dictator and his supporters.<sup>3</sup>

Far from being contradictory, however, both of these decisions are consistent with the political reality that has shaped the evolution of the Haitian justice system over the last two decades. Much of the attention of donor agencies, international organizations and observers has focused on the most egregious symptoms of a weak and dysfunctional system: thousands of citizens have languished in prison without trial, individuals accused of corruption, human rights abuse or violence are rarely brought to justice, and the system remains inaccessible for most citizens. A series of reform efforts over the last two decades have focused on the legal and organizational deficits that drive these dysfunctions, including archaic laws and procedures and dominance by the executive branch that have left the judiciary chronically under-resourced, poorly skilled and prone to manipulation. Two decades of reform efforts backed by international development agencies in North American and Europe have failed to produce any meaningful change in either the symptoms of dysfunction or the legal organizational deficits that are believed to cause them. Instead, the same political logic that has driven these notorious judicial decisions has also shaped the justice system's organizational and legal structure and blocked most attempts to reform it. Understanding the performance of the judiciary and the failure of two decades of reform efforts thus requires looking beyond laws and procedures to the underlying political reality.

In this article, I argue that the evolution of the Haitian justice system over the last two decades is rooted in the failure of Haiti's transition from authoritarian rule to result in meaningful political competition or in space for genuine political or civic participation. Following the demise of a predatory, single-party regime, the judiciary has evolved in the context of persistent efforts by polarized elites to concentrate political authority while relying on informal

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2. For a detailed analysis of this decision, see *Une Ordonnance de la Honte a été rendue par le Juge d'Instruction*, 2012 Réseau National de Défense des Droits Humains [RNDDH] (Feb. 3, 2012); *Haiti: Duvalier Ruling Disappoints Justice*, HUMAN RIGHTS WATCH (Jan. 31, 2012), available at <http://www.hrw.org/news/2012/01/31/haiti-duvalier-ruling-disappoints-justice>.

3. *Haiti: Dropping Jean-Claude Duvalier case 'a disgrace'*, 2012 AMNESTY INT'L, (Jan. 31, 2012), available at <http://www.amnesty.org/en/news/haiti-dropping-jean-claude-duvalier-case-disgrace-2012-01-31>.

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networks to repress opposition and limit space for civil society. The role of the judiciary in these political dynamics has played out most evidently in high-profile judicial decisions, which, like the Duvalier and Les Cayes decisions, have reflected prevailing political tendencies and enabled ruling parties to pursue their political and economic interests. The political role of the judiciary is further evident on a deeper level in local politics, where a compliant judicial and law enforcement bodies facilitate the distribution of jobs, economic assets, land and electoral victory, which in turn enable politicians to maintain power at the national level. This political logic has driven decisions regarding the laws and organizational structures that affect the day-to-day performance of the judiciary. Yet most efforts by international development agencies to reform the judiciary have stayed far from these underlying challenges. In some cases, foreign aid may even have reinforced the conditions that have sustained the current structure and performance of the Haitian justice system.

This article analyzes judicial reform efforts in Haiti in light of the country's political trajectory. The analysis that follows is neither a comprehensive description nor an exhaustive analysis of Haiti's justice sector, but is rather an attempt to highlight key elements of the political context that are typically neglected in analyses of the justice system. I draw primarily on published reports, laws and procedures, as well as on my own research and observations collected while working on donor-funded justice sector programs in Haiti.<sup>4</sup> The article proceeds as follows. I first lay out the primary challenges faced by the justice system. Next, I focus on the legal and organizational deficits that have been the focus of most donors and practitioners, and describe their reform efforts. I focus on the judicial system, including the courts and prosecutors, along with the laws, procedures and personnel that make them up. Although I do not delve into the workings of other parts of the justice sector, such as the police, corrections system, local governments and legislature, I highlight areas where the judiciary is deeply interdependent with them and where they have been shaped by similar dynamics.<sup>5</sup> In the following section, I explain the failure of reform efforts by highlighting salient features of

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4. From 2004 to 2010, the author served as a rule of law advisor for the U.S. Agency for International Development, where he designed and managed justice sector development programs in Haiti.

5. For a more thorough analysis of the police and corrections systems, see Isabelle Fortin & Yves-François Pierre, *Haïti et la réforme de la Police Nationale d'Haïti*, 2008 INSTITUT NORD-SUD.

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Haiti's political transition and its effects on judicial reform efforts. I argue that the drive for concentration of authority and weakness of organized constituencies has closed off space for peaceful political competition and created incentives to keep the justice system weak and compliant. I then show why efforts by external donors to strengthen the justice sector have failed to bring about meaningful change within this context. This analysis thus points to the deeply rooted challenges that have limited the impact of efforts to strengthen the justice system and improve its credibility or responsiveness to citizens. Yet it also points to avenues for change that have so far been neglected, many of which lie outside the legal and judicial processes that have dominated the attention of donors so far. In the concluding section, I point to some of these alternative approaches that might lead to a way out of the cycle of past failures.

## II. THE CHALLENGES FACING THE HAITIAN JUSTICE SYSTEM

The challenges facing the Haitian justice system have been well documented and frequently described. At once inaccessible to most of the population and a source of frequent human rights abuses, the government of Haiti has itself acknowledged its failings in describing the "deep mistrust of the judicial system by all citizens, within a context where access to law and justice remains difficult and random."<sup>6</sup> Such mistrust appears on the surface to be fueled by the failures of the justice system to meet basic functions expected of it, from prosecuting crime to preventing basic human rights abuses and resolving everyday disputes. Going one level deeper, these failings are rooted in the complex legal and institutional structures that have stubbornly resisted efforts at reform over the last twenty years. Yet both the symptoms of dysfunction and the failure of legal and institutional reform efforts emerge from the underlying political reality that has shaped Haiti's judicial evolution over the last two decades.

A. *Symptoms of Judicial Dysfunction*

Primary among the concerns of legal and human rights specialists working in Haiti has been the failure of the justice system to protect basic human rights. Among the most commonly cited abuses is the high rate of illegal pretrial detention in Haiti's over-

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6. REPUBLIC OF HAITI, SUMMARY REP. ON INTERIM COOPERATION FRAMEWORK 2004-2006 (July 2004).

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crowded prisons.<sup>7</sup> Over the last decade, the percentage of detainees in Haiti's prisons awaiting final disposition of their cases has ranged from a low of seventy percent to a high above ninety percent, giving it one of the highest rates of pre-trial detention in the world.<sup>8</sup> This data does not include detainees in police holding cells, who routinely spend a month or more in these cells prior to being formally charged yet are not tracked in any official registry.<sup>9</sup> Many detainees in Haiti's prisons and holding cells are held for longer than the law allows without trial, some have never seen a judge, and some are held in pre-trial detention longer than the maximum sentence for the crime for which they are accused.<sup>10</sup>

At the same time, the justice system is frequently criticized for its failure to prosecute criminal cases effectively, resulting in widespread impunity for perpetrators of high-level corruption and ordinary crime alike.<sup>11</sup> In addition to the Duvalier case, the Haitian justice system has failed to investigate, prosecute or convict scores of human rights abuses and ordinary crimes.<sup>12</sup> The massive earthquake in January 2010, in which hundreds of thousands of Haitians lost their lives, homes, and livelihoods, highlighted the system's failure to investigate or prosecute numerous sexual and gender-based violence cases that came to light as a result of women's increased vulnerability while living in tent camps.<sup>13</sup>

7. See generally Anne Fuller et al., *Prolonged Pretrial Detention in Haiti*, VERA INST. OF JUSTICE (July 2002); National Center for State Courts (NCSC) (2006) (hereinafter, NCSC (2006)). "Pretrial Detention in Haiti." Washington, DC: U.S. Agency for International Development. See also HUMAN RIGHTS WATCH, WORLD REPORT 2011 248-51 (2011).

8. These statistics are based on data from Haiti's National Prison Administration (APENA) database. For statistics and analysis, see Fuller et al., *supra* note 7; NCSC (2006), *supra* note 7. For global rates, see INT'L CTR. FOR PRISON STUDIES, <http://www.prisonstudies.org> (last visited Apr. 4, 2013).

9. NCSC (2006), *supra* note 7, at 32. See also Fuller et al., *supra* note 7, at 19.

10. The percentage of detainees in these categories varies considerable over time. According to an analysis conducted in 2006, only a small percentage were held longer than their maximum sentences, while the majority were held for short periods of time and then released – although many beyond the time limits allowed by law without conviction. See NCSC (2006), *supra* note 7.

11. See generally *Haiti – Justice: Une Barque a la Derive*, RNDDH, Jan. 2006.

12. For a description of some of these cases, see SARAH A. DECOSSE & KENNETH ROTH, HUMAN RIGHTS WATCH, *Thirst for Justice: A Decade of Impunity in Haiti*, (Sept. 1996), available at <http://www.hrw.org/sites/default/files/reports/HAITI969.pdf>; See also *Haiti: Hundreds Killed Amid Rampant Impunity*, HUMAN RIGHTS WATCH (Apr. 13, 2005), available at <http://www.hrw.org/print/news/2005/04/13/haiti-hundreds-killed-amid-rampant-impunity>.

13. Press release, Inter-Am. Comm'n H. R., *IACHR Expresses Concern over Situation in Camps for Displaced Persons in Haiti* (Nov. 18, 2010); see also *Struggling to Survive: Sexual Exploitation of Displaced Women and Girls in Port-au-*

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Overall, the rate of conviction of Haiti's criminal justice system is estimated at three percent (compared to between sixty and eighty percent in the U.S. depending on the type of crime),<sup>14</sup> and over 1,200 murders per year are never investigated.<sup>15</sup> Despite the overcrowding in Haiti's prisons, the country has one of the lowest incarceration rates in the world, at fifty-five detainees per 100,000 inhabitants.<sup>16</sup> In sum, since the justice system is unable to convict most cases, abuse of rights is common as law enforcement officials hold people without conviction. Meanwhile, most Haitians are left with little recourse when they experience a crime, dispute or violation of their rights.

Haitian citizens' most common experience with their justice system, however, is its absence. For the millions of residents of Haiti's poor urban neighborhoods and remote rural villages, the justice system is not accessible for resolving most issues, whether civil or criminal. This reality was starkly exposed following the 2010 earthquake when thousands of families seeking to secure their properties, belongings, and social benefits in order to rebuild their homes and livelihoods were blocked by their inability to secure crucial civil documentation such as birth and death certificates. According to the World Bank, forty percent of Haitians lack the basic civil identity documentation necessary to even secure legal standing before a court.<sup>17</sup> The proceedings needed to secure these documents are highly complex involving numerous steps and the assistance of a lawyer, and individuals must travel far—often as far as Port-au-Prince. For other types of civil matters, the courts are even less accessible. In 2003, Haiti had only 600 judges and prosecutors and 750 attorneys for a population of over 8 million people, including 375 justices of the peace who handle roughly seventy percent of matters dealt with by the justice system.<sup>18</sup> The number of judges has barely increased since then. Most courts are

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*Prince, Haiti*, MADRE (2012), available at [http://www.madre.org/images/uploads/misc/1328542465\\_Haiti%20SE%20Report%20FINAL%20pub%20sm%20ENG%20020212.pdf](http://www.madre.org/images/uploads/misc/1328542465_Haiti%20SE%20Report%20FINAL%20pub%20sm%20ENG%20020212.pdf).

14. NCSC (2006), *supra* note 7, at 17.

15. INTERNATIONAL LEGAL ASSISTANCE CONSORTIUM, ILAC REPORT, 22, (2005).

16. As a comparison, the rates are 213 per 100,000 in the Dominican Republic, 163 per 100,000 in Jamaica, 391 per 100,000 in El Salvador, and 200 per 100,000 in Mexico. INT'L CTR. FOR PRISON STUDIES, *World Prison Brief*, <http://www.prisonstudies.org/info/worldbrief/> (last visited Dec. 18, 2013).

17. THE WORLD BANK, SOCIAL RESILIENCE AND STATE FRAGILITY IN HAITI: A COUNTRY SOCIAL ANALYSIS, 54 (2006).

18. REPUBLIC OF HAITI, *supra* note 6, at 14. These personnel are spread across 181 Justice of the Peace courts, 15 courts of first instance, and 5 courts of appeal. See Léon Saint-Louis, IFES: STATE OF THE JUDICIARY REPORT: HAITI 2002-2003, 38 (2004).

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located in the urban centers and are barely accessible for rural residents who must contend with poor roads and costly transportation. Proceedings are routinely conducted in French while most Haitians understand only Kreyol and forty percent are illiterate.<sup>19</sup> Where courts are geographically accessible, the costs of filing fees and legal representation are prohibitive for most Haitians, forty-nine percent of whom live on less than \$1USD per day.<sup>20</sup> The limited legal aid provided by bar associations or externally-funded programs is mostly reserved for criminal defense, with little support available to victims of crimes or to civil litigants.<sup>21</sup>

In sum, the justice system is inaccessible and irrelevant for most Haitians. On the criminal side, because the system is unable to convict most cases, police routinely detain people without conviction. When faced with pressure the police might release these detained individuals, or they simply leave the prisoners to languish behind bars. Meanwhile, most Haitians are left with little recourse when they are victims of a crime, dispute, or violation of their rights. As a result, less than half of Haiti's citizens believe that their courts guarantee a fair trial, and confidence in the Haitian justice system is the lowest in the Americas at 35 percent.<sup>22</sup> Few cases are ever brought to court, while the majority of civil disputes and criminal cases are resolved outside the justice system by local "notables" (the term commonly used to describe local authority figures including local government officials, religious leaders or community leaders). The extent to which these informal processes are fair and credible for various segments of Haiti's population is largely unknown within the legal community.

*B. The Failure of Legal and Institutional Reform Efforts*

Over the last two decades, extensive efforts have been undertaken to address these challenges by building more credible and effective legal and judicial institutions. Numerous reports by

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19. THE WORLD BANK, SOCIAL RESILIENCE AND STATE FRAGILITY IN HAITI: A COUNTRY SOCIAL ANALYSIS, ii (2006).

20. *Id.*

21. There are some notable exceptions, including several women's organizations that provide assistance to victims of sexual violence. The Institute for Justice and Democracy in Haiti provides legal assistance on some civil matters such as land and property issues.

22. DOMINIQUE ZEPHYR & ABBY CORDOVA, U.S. AGENCY FOR INT'L DEV., HAITI IN DISTRESS: THE IMPACT OF 2010 EARTHQUAKE ON CITIZEN LIVES AND PERCEPTIONS 102 (March 2011).



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development agencies, human rights organizations and other observers have documented the dysfunctions of the justice system and sought to explain them. These reports have generally attributed these dysfunctions to deficits in legal norms and organizational structures relative to systems in Europe or North America. For example, a 2000 U.S. Government Accounting Office report highlighted a long list of deficits, including: “lack [of] independence from the executive branch . . . outdated legal codes and cumbersome judicial proceedings . . . inadequate infrastructure and shortages of personnel and equipment . . . limited investigative capabilities . . . corruption and an ineffective internal oversight capability.”<sup>23</sup> In response, development agencies and Haitian legal professionals have pursued various approaches to overcoming these deficits, ranging from training officials to improve their skills, to re-drafting laws and procedures, setting up new administrative and management systems, and funding legal aid programs to help cases move through the system.

Two sets of issues have tended to receive the bulk of attention by external donors: the functioning of the criminal justice system and the limitations of its legal and procedural codes; and the organizational structure of the judiciary, including internal administration and the relationship between the judicial and executive branches. Confronting the legal and organizational shortfalls in these two areas have been seen as fundamental to overcoming the weak performance of the justice system. At the same time, these two areas serve to illustrate the failure of reform efforts. Despite a wide range of programs and approaches, the laws and organizational structures remain mostly unchanged. Most efforts to revise legal norms, restructure organizations and enhance the skills of personnel have failed to take root, while case delay, human rights abuse and barriers to access persist.

In the criminal justice realm, antiquated laws, procedures and practices have been the target of considerable reform efforts. Haiti’s five major codes, the penal code, civil code, commercial code, criminal procedure code and civil procedure code, which are mostly reproductions of the French Napoleonic codes, have remained largely unchanged since they were adopted in 1835. While similar codes in Europe and Latin America have undergone substantial revisions to reflect modern criminal challenges and

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23. UNITED STATES GENERAL ACCOUNTING OFFICE, FOREIGN ASSISTANCE: ANY FURTHER AID TO HAITIAN JUSTICE SYSTEM SHOULD BE LINKED TO PERFORMANCE-RELATED CONDITIONS, 14 (2000).

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legal thinking, Haiti's codes have remained mostly stagnant.<sup>24</sup> In some areas, the codes violate the country's 1987 Constitution.<sup>25</sup> For example, the penal code stipulates that twenty or more persons who gather to discuss religion, politics or literary issues without official government permission are committing a crime, in violation of constitutional protection of freedom of speech and assembly.<sup>26</sup> The penal codes also fail to adequately protect women and children from sexual and gender-based violence, or recognize such "modern" crimes as corruption and organized crime, cyber-crime, trafficking in persons, torture and crimes against humanity. Although some of these gaps have been filled through new legislation in the last few years, their implementation has been stymied by the complexity of criminal procedure. The criminal procedure codes require multiple and cumbersome steps for a case to advance from the initial report through the investigation, involving files changing hands several times between the justice of the peace, prosecutors and investigating judges.<sup>27</sup> The procedural law also lacks many of the basic investigative tools and evidentiary standards that facilitate criminal investigation in other jurisdictions.

These complex procedures have persistently contributed to both the high rate of illegal pre-trial detention in Haiti's prisons and police stations and the failure to successfully prosecute criminal cases. The complexity of the procedures generates numerous opportunities for manipulation, and case files are frequently lost or delayed as they change hands among justices of the peace, prosecutors, judges, and clerks.<sup>28</sup> Frequent personnel rotations, the lack of filing procedures or case management system, and poor management further contribute to case delay. Within this complex system, political or economic pressures seem to frequently play the deciding role in whether cases advance, although the cause of

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24. On the evolution of procedure elsewhere in Latin America, *see generally* LINN A. HAMMERGREN, ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA, (Pa. State Univ. Press, 2007).

25. For a detailed analysis, *see generally* HANS JOERG ALBRECHT ET AL., USIP PEACE BRIEFING: BUILDING THE RULE OF LAW IN HAITI: NEW LAWS FOR A NEW ERA, (2009).

26. CODE PÉNAL [C. PÉN], art. 162–64 ; 236 (Haiti).

27. *See generally* Code d'Instruction Criminelle (Haiti).

28. For a detailed treatment of procedural elements that contribute to pre-trial detention and corruption, *see* Fuller et al., *supra* note 7; *see also* COMMISSION CONSULTATIVE SUR LA DETENTION PREVENTIVE PROLONGEE (CCDPP), RAPPORT FINAL SUR LA PROBLÉMATIQUE DE LA DÉTENTION PRÉVENTIVE PROLONGÉE DANS LA JURIDICTION DU TRIBUNAL DE PREMIÈRE INSTANCE DE PORT-AU-PRINCE (2008).

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delay for any individual case is generally opaque. Provisions mandating severe jail sentences for minor crimes along with the absence of provisions for bail and alternative forms of sentencing further contribute to overcrowding in Haiti's prisons.<sup>29</sup>

Haiti's outdated legal codes have also impeded efforts to improve investigation and prosecution outcomes. Unrealistic time limits—two months for the investigation of even the most serious felonies—along with the absence of provisions for the use of physical evidence or for the protection for victims or witnesses impede the effective prosecution of all but the most minor crimes. The absence of procedures governing the use of basic forms of evidence beyond oral testimony leaves the results subject to a high level of discretion. In some cases, motivated prosecutors and judges rely on oral confessions and broad discretion to enable conviction, but often at the expense of the rights of the accused.<sup>30</sup> Moreover, these decisions are easily challenged on appeal, especially when subject to political pressure.

In the face of these complex procedures, efforts by donors to reduce pre-trial detention or improve prosecution outcomes through training and capacity-building have failed to achieve their intended outcomes. Donor-funded efforts have attempted to tackle these problems by training personnel or intervening directly to reduce the number of detainees held in prisons and police stations beyond the period allowed by law.<sup>31</sup> Special task forces, case management systems, special sessions and other administrative measures have at times temporarily reduced the number of detainees held illegally, but as these special measures end, personnel have reverted to the procedures specified in law and the percentage of pre-trial detainees inevitably increases.<sup>32</sup>

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29. For example, Article 408 and Article 409 of the Penal Code provide for up to six months in prison for theft of an object whose value does not exceed US \$20. CODE PÉNAL [C. PÉN.] art. 408-409 (Haiti).

30. One prosecutor explained to the author that to prosecute organized crime cases, since no witnesses were willing to testify and no physical evidence was provided, he relied primarily on newspaper reports about the crimes of the accused. He noted that he was often successful in achieving convictions in this way. Interview with Haitian Prosecutor (name withheld), in Port-au-Prince, Haiti (Oct. 2011).

31. The USAID-funded *Bureau de Controle de la Detention Preventive* (BUCODEP) program, established in 1998, was among the first efforts to review individual cases of pre-trial detainees and set up expedited measures to process these cases. Several projects have pursued similar approaches over the last decade that include intensive review of cases expedited processing, and analysis of broader obstacles. See National Center for State Courts, *Haiti: Rule of Law Assessment* 26-28 (Aug. 2004), available at [http://pdf.usaid.gov/pdf\\_docs/PDACM444.pdf](http://pdf.usaid.gov/pdf_docs/PDACM444.pdf).

32. One recent attempt by a prosecutor in Port-au-Prince to reduce case delay

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Successes in reducing high levels of pre-trial detention in other countries have almost always required revisions to the criminal procedure, such as time limits with mandatory releases or the introduction of plea bargaining, rather than administrative approaches alone. Efforts to train police, prosecutors and judges in modern investigative techniques and procedures have similarly produced little sustained impact. Outside trainers have tended to base their training on procedures from other jurisdictions that are inconsistent with Haitian law because many types of evidence and techniques are not regulated by Haitian law. Like the special procedures put in place to reduce pre-trial detention, these practices are most often abandoned soon after international trainers depart.

On a parallel track, Haitian lawyers have attempted to reform criminal procedures and criminal codes. A series of legal reform commissions beginning with the *Commission Préparatoire à la Reform du Droit et de la Justice* (Preparatory Justice and Law Reform Commission) established in 1997 have recommended numerous legal amendments and produced several draft laws. Several special commissions focusing on pre-trial detention, criminal investigation and other issues have concluded that reforms to the codes are essential, and provided numerous recommendations and approaches to doing so.<sup>33</sup> Yet none of these efforts have resulted in substantial changes, especially to criminal procedure. The most recent in this long series of efforts was a Presidential Commission on Justice Sector Reform established in 2009, which produced a revised penal code and criminal procedure code. Led by former Justice Minister Rene Magloire, the commission worked with “model codes” produced by the Washington-based U.S. Institute of Peace, which were adapted to the local context through extensive discussions and consultations.<sup>34</sup> The draft proposed many significant—and sometimes controversial—innovations, such as the abolition of the role of the investigative judge, the introduction of plea-bargaining and alternative forms of incarceration, and provisions for new forms of evidence.<sup>35</sup> A parallel effort

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through administrative procedures achieved only temporary effect because it was abandoned when that prosecutor was transferred. See *International Donor Assistance to the Justice System in Haiti: Evaluation Report*, 2008 US AGENCY FOR INT’L DEV. 24 (2008).

33. See generally CCDPP, *supra* note 30.

34. ALBRECHT ET AL., *supra* note 25, at 5.

35. Interview with Rene Magloire, former Justice Minister, in Port-au-Prince, Haiti (Apr. 2011).

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produced a draft law aimed at establishing a national system of legal aid to help criminal defendants navigate the justice system. Despite formal endorsement by current and prior Ministers of Justice, however, the draft laws did not make it to the Parliament. Moreover, the passage of these draft laws would constitute only the first step in a lengthy and intensive process of implementation that will require training justice sector professionals and applying new—and sometimes costly—procedural requirements. As of this writing, efforts to reform the criminal law and procedure remain unfulfilled.

A second broad area of reform efforts has focused on the weak administration of justice and dominance of the judiciary by the executive branch, which have contributed to widespread perception of corruption. Despite its formal status as a fully independent branch of government, the judicial branch has remained fully dependent on the executive branch for most of the last two decades. The 1987 Constitution established the judiciary as a fully independent branch of government, co-equal to the legislative and executive branches, and “entirely responsible for its own acts.”<sup>36</sup> The Constitution provides judges with security of tenure, sets out mechanisms for public participation in their nomination, and authorizes the judiciary to manage its own administration.<sup>37</sup> Judges of the Supreme Court are to be nominated by the Senate, the departmental assemblies nominate appellate judges, and communal assemblies nominate first instance judges, and justices of the peace. In practice, however, the communal and departmental assemblies have never been established, and the judiciary has not had its own systems for administration or self-governance. Responsibility for managing the courts, prosecutors and all of their human and physical resources has fallen to the Ministry of Justice and Public Security (MJSP). The MJSP appoints, transfers and removes judges, prosecutors and justices of the peace,

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36. Constitution de la République d’Haïti Mar. 29, 1987, Title V, art. 60-2.

37. In the 1987 Constitution of Haiti, Article 175 provides for appointment of judges based on lists generated by communal, department and national assemblies, however the local assemblies have never existed in practice. *Id.* at Ch. V, art 175; see also Article 177 stating that “Judges of the Supreme Court, the Courts of Appeal and the Courts of First Instance are appointed for life. They may be removed from office only because of a legally determined abuse of authority or be suspended following and indictment leveled against them. They may not be reassigned, without their consent, even in the case of a promotion. Their service may be terminated during their term of office only in the event of a duly determined permanent physical or mental incapacity.” *Id.* at Ch. V, art. 177.

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and manages most of the judiciary's budget, finances and administration.

The judiciary's position under the control of the MJSP has contributed to its weak administrative capacity, vulnerability to manipulation, and inability to ensure internal discipline or accountability. The MJSP is itself woefully understaffed and under-resourced—with only one percent of the national budget—and it typically allocates only eleven percent of that meager budget to the courts, with the rest devoted to police, corrections, the civil registry and other functions.<sup>38</sup> Without a dedicated budget or separate administrative structure to manage the courts, set policy or allocate resources, judges, prosecutors, and court personnel have been unable to adopt or sustain even the most basic administrative systems.<sup>39</sup> The tendency of the MJSP to frequently rotate judges and prosecutors according to bureaucratic—and often political—imperatives has undermined improvements in management and administration. As personnel tend to rotate to other positions as soon as they are trained in new procedures, efforts to train them in specific areas of the law have rarely improved overall performance. Control by the executive branch over all administrative and financial matters has also enabled constant influence and pressure.<sup>40</sup> In the absence of clear rules or procedures governing disciplinary matters for judges, the MJSP has removed several justices of the peace, prosecutors, and judges without a formal disciplinary process.<sup>41</sup> Some of these removals may have been motivated by legitimate allegations of corruption. Nonetheless, the absence of procedures for proving or disproving such allegations has left the process open to manipulation and fueled the common perception that judges are neither independent nor neutral, and that economic and political pressure shape decisions.

Reform efforts by donors and Haitian civil society actors have therefore focused on strengthening administrative practices and on establishing an independent judicial council that would man-

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38. National Center for State Courts, *supra* note 31, at 22.

39. For instance, one review found that case registration procedures introduced by a USAID-funded program had not been sustained because they had run out of logbooks. See *International Donor Assistance to the Justice System in Haiti: Evaluation Report*, 2008 U.S. AGENCY FOR INT'L DEV. (2008).

40. See Leon St. Louis, *State of the Judiciary Report: Haiti 2002-2003*, 2004 INT'L FOUND. FOR ELECTION SYS. 20.

41. *Id.* at 24.

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age the affairs of the judiciary.<sup>42</sup> Most projects have focused on developing new administrative and management practices to improve the efficiency and consistency of judicial processes, and reduce opportunities for discretion and manipulation. For example, several donor-funded programs sought to set up case registration and tracking systems in courts and prosecutors' offices to improve the flow of cases and to reduce delay and corruption.<sup>43</sup> In the absence of an organizational structure that could sustain reforms, however, few of these efforts have outlasted the programs that sponsored them. As courts have run out of logbooks, file folders and other supplies due to the lack of sufficient resources or management procedures within the judiciary, they have reverted to more traditional ways of operating.<sup>44</sup>

As progress on strengthening administrative and management practices has lagged, donors and Haitian activists have also sought to reform the organizational structure that has contributed to keeping the judiciary under-resourced, poorly managed and vulnerable. Reports produced by USAID dating back to the 1990s pointed out the contradiction between constitutionally mandated separation of powers and continued dominance of the executive over the judiciary, and recommended measures for enhancing the authority of the judiciary over its own affairs.<sup>45</sup> Laws to this effect were proposed as early as 1998 but never taken up by the Haitian legislature. Since 2004, donors have devoted greater attention to

42. These efforts reflect interest by donors across Latin America to support judicial councils as a means to promote judicial independence and accountability. See generally Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMP. L. 103 (2009); Linn Hammergren, *Do Judicial Councils Further Judicial Reform? Lessons from Latin America* 1-52 (Carnegie Endowment for Int'l Peace, Working Paper No. 28, 2002), available at <http://law.wisc.edu/gls/lhdjc.pdf>; Violane Autheman & Sandra Elena, *Global Best Practices-Judicial Councils: Lessons Learned from Europe and Latin America*, 2004 INT'L FOUND. FOR ELECTION SYS., available at [http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2004/22/WhitePaper\\_2\\_FINAL.pdf](http://www.ifes.org/~media/Files/Publications/White%20PaperReport/2004/22/WhitePaper_2_FINAL.pdf).

43. See U.S. STATE DEPARTMENT, OFFICE OF THE HAITI SPECIAL COORDINATOR, REPORT TO CONGRESS: ASSESSMENT OF THE U.S. GOVERNMENT HAITI REBUILDING AND DEVELOPMENT STRATEGY (June 6, 2012), available at <http://www.state.gov/s/hsc/rpt/191881.htm>.

44. See generally U.S. AGENCY FOR INT'L DEV., HAITI: RULE OF LAW ASSESSMENT (Aug. 2004), available for download at: <https://dec.usaid.gov/dec/GetDoc.axd?ctID=ODVhZjk4NWQtM2YyMi00YjRmLTkxNjktZTcxMjM2NDhmY2Uy&rID=MzA0NzAw&pID=NTYw&attchmnt=VHJ1ZQ=&uSesDM=False&rIdx=MTAxOTE1&rCFU=>.

45. See e.g., CREATIVE ASSOC. INT'L, EVALUATION OF USAID'S ADMINISTRATION OF JUSTICE AND HUMAN RIGHTS FUND II PROGRAMS 88 (Apr. 1997). To access the full library of U.S. AID's Haiti Evaluation reports, go to U.S. AID's "Haiti" page, and click the link under "Learn More" entitled "Evaluations for Haiti" at <http://www.usaid.gov/where-we-work/latin-american-and-caribbean/haiti>.

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implementing constitutional provisions establishing the independence of the judicial branch. These efforts eventually resulted in a significant breakthrough in 2007. A campaign by legislators, civil society actors, and judges supported by donor resources and attention resulted in the passage of three new laws to govern the judiciary and remove it from the control of the executive branch. The Law on the *Conseil Supérieur du Pouvoir Judiciaire* (CSPJ) establishes a High Judicial Council with authority over selection, appointment, discipline of judges, as well as over the administration of justice and management of financial and material resources.<sup>46</sup> The law on the *Statut de la Magistrature* regulates the functions and career standards for judges, prosecutors, and judges of the peace, and raises judicial salaries.<sup>47</sup> The third law formally establishes the *Ecole de la Magistrature* (EMA), a training academy for judges and prosecutors. The academy was previously set up with donor assistance in the early 1990s, but was severely constrained by its lack of legal status.<sup>48</sup> These three laws were seen as the foundation for building the organizational and administrative infrastructure that could manage judicial functions and insulate them from executive influence.

Over five years after their adoption, however, the constitutional and legal provisions protecting judicial independence and self-governance remain unfulfilled. Although President Rene Preval signed and promulgated the laws in 2007, his failure to appoint justices to fill six vacant positions on the Supreme Court, including that of the Chief Justice whose presence was required to convene the new High Judicial Council, effectively blocked the implementation of these three laws. The resulting stalemate between the executive branch and the judiciary exacted a broader toll, as the Supreme Court could not achieve a quorum to rule on many cases, and donors began to withhold their assistance to the sector. In February 2012, nearly a year into the presidency of Michel Martelly—who had made the rule of law one of the four pillars of his administration—the vacant positions on the Supreme Court were filled and the government announced that it would establish the CSPJ and implement the three laws. Yet this belated step was only the first in the long process required to

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46. Loi Creant le Conseil Supérieur du Pouvoir Judiciaire [Act Establishing the Higher Council of the Judiciary], MONITEUR No. 112, Dec. 20, 2007.

47. Loi Portant Statut de la Magistrature, [Statute Regulating the Judiciary], MONITEUR No. 112, Dec. 20, 2007.

48. Loi Relative a L'Ecole de la Magistrature, [Act Regarding the Judicial Institution], MONITEUR No. 112, Dec. 20, 2007.



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establish and maintain a functional and credible judicial council. The appointments themselves were mired in controversy, and the CSPJ initially lacked formal allocation of staff and budget that would allow it to function. Given the challenges in its initial implementation, it will inevitably encounter further obstacles along the way. Meanwhile, the local assemblies that are constitutionally mandated to nominate lower court judges still do not exist, and alternative procedures for nomination, appointment or transfer of judges have yet to be adopted. Neither the legal structures guaranteeing judicial independence nor the administrative practices envisioned by donors have so far been implemented.

### III. THE POLITICAL ORIGINS OF HAITI'S JUDICIAL EVOLUTION

The challenges facing the Haitian justice system and the limited success of reform efforts reflect broader political and social forces that have shaped the development of the Haitian state over the last two decades. As development agencies have focused on the organizational structures and laws that comprise the Haitian justice sector, they have made little headway in overcoming the key challenges. Instead, they have repeatedly confronted entrenched obstacles that have arisen even when the opportunities for reform appear ripe. The focus on the deficits in Haitian law and procedure relative to an external standard has obscured the context in which they are embedded. The Haitian justice system may be dysfunctional measured according to external standards, but it is also the product of a particular set of social and political conditions that continue to sustain it and undermine efforts to fit it to external standards. The evolution of the judiciary cannot, therefore, be explained through examination of its legal and organizational structures alone, but requires a deeper look at the political and social forces that have shaped it.

Looking outside Haiti, comparative literature on the development of judicial institutions has looked beyond legal norms or organizational structures to their political and social context. In his seminal study of judicial development, Martin Shapiro traced the origin of independent judiciaries in Europe to highly political processes that included attempts by powerful nobles and merchants to restrain predatory monarchies.<sup>49</sup> A rich literature

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49. MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 63, 155-56 (2nd ed. 1986).

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has since developed on the political dimensions of judicial evolution. Several scholars link the emergence of judicial independence to the nature of political authority and competition among interest groups and political parties.<sup>50</sup> Where power is shared among multiple parties and political competition is intense, no group is able to exert sufficient influence to dominate the courts. In such contexts, both the ruling and opposition parties have incentives to support an independent judiciary that can serve as a “neutral arbiter” rather than risk being punished by a politicized judiciary when they are out of power.<sup>51</sup> Other authors have emphasized the role of interest groups and citizens in advocating for independent and effective judiciaries, when they are sufficiently organized to influence political decision-making.<sup>52</sup> In the context of contemporary transitions from conflict or authoritarian rule in developing countries, judicial independence has emerged as a result of critical junctures of factors, including support within the executive for a break with past practices, a judicial leadership that is willing and able to make its case for greater independence, and, often, pressure by external donors.<sup>53</sup> The process of building a judiciary that enjoys popular trust may also involve a lengthy period of confidence-building among increasingly capable and assertive judges,

50. J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts*, 23 J. LEG. STUD. 721 (1994); see generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003); MARK J. RAMSEYER & ERIC B. RASMUSEN, MEASURING JUDICIAL INDEPENDENCE: THE POLITICAL ECONOMY OF JUDGING IN JAPAN (2003); Matthew C. Stephenson, “When the Devil Turns. . .”: *The Political Foundations of Judicial Independent Judicial Review*, 32 (1) J. LEG. STUD. 59 (2003); John A. Ferejohn, *Judicializing Politics, Politicizing Law*, 65 L. & CONTEMP. PROBS. 41 (2002); see generally John A. Ferejohn, Frances McCall Rosenbluth & Charles R. Shipan, *Comparative Judicial Politics*, (October 2004), SOCIAL SCIENCE RESEARCH NETWORK (SSRN) <http://ssrn.com/abstract=1154123>; William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975).

51. Bjorn Dressel & Marcus Mietzner, *A Tale of Two Courts: The Judicialization of Electoral Politics in Asia*, 25 GOVERNANCE, 391-414 (2012).

52. Eric G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformer’s Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, 336 (Erik G. Jensen & Thomas C. Heller eds., 2003); Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case*, 95 AM. J. INT’L L., 64-75 (2001); see also Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91(2) AM. POL. SCI. REV. 245 (1997).

53. Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist’s Perspective on the African Case*, 95 AM. J. INT’L L., 64-75 (2001); WIDNER, BUILDING THE RULE OF LAW: FRANCIS NYALAI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA 198-99 (2001); Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 U. TORONTO L.J. 341, 345 (2009).

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bar and law societies playing watchdog roles over judicial processes and appointments, and interest groups and opposition parties with incentives to support them.<sup>54</sup> In sum, the development of a judiciary during transitions from authoritarian rule or conflict cannot be understood outside the context of the political forces that drive those transitions.

The evolution of the Haitian judiciary should thus be examined within the context of Haiti's transition from authoritarian rule. Following the end of authoritarian rule and the adoption of the 1987 Constitution, Haitian citizens and their international partners had high hopes for the establishment of democratic rule underpinned by effective judicial and law enforcement institutions. Yet this transition—which by many accounts is not yet complete—has not generated the type of political competition or organized constituencies that might enable the development of independent, credible or effective judiciaries. Instead, a persistent drive toward concentrated and exclusive political authority combined with restricted space for organized interest groups has prevented the emergence of an independent, credible or capable judiciary.

For most of its history, the Haitian judiciary served to reinforce a highly centralized and predatory state, while remaining distant and irrelevant for most of Haiti's citizens. Since its struggle for independence from France in 1805, the Haitian state has been the object of an unending succession of violent contests for control of the state and its resources by elite property owners and military leaders.<sup>55</sup> As one observer noted, "Haitian rulers came to conceive of governance as a zero-sum game; virtually all of them looked at political power as a brutal, indivisible quantity that could be won collectively, but that had to be kept individually and exercised absolutely."<sup>56</sup> Most state institutions, including the judiciary, served as a spoil of victory within these contests and as a means to sustain the power of elites by consolidating authority

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54. *Id.*

55. Following the Haitian revolution in 1804-1805, an internal power struggle resulted in 22 regime changes beginning in 1843 until 1915. In 1915, the U.S. military intervened and occupied Haiti for 19 years. See MATS LUNDAHL, PEASANTS AND POVERTY: A STUDY OF HAITI (1979); EUGENE D. GENOVESE, FROM REBELLION TO REVOLUTION: AFRO-AMERICAN SLAVE REVOLTS IN THE MAKING OF THE MODERN WORLD 89 (1979).

56. Robert Fatton Jr., *Haiti: the Saturnalia of Emancipation and the Vicissitudes of Predatory Rule*, 27 THIRD WORLD Q. 118 (2006).

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and excluding opponents. At the same time, these institutions played little tangible role in the lives of most Haitians.

The use of justice institutions to maintain concentrated authority deepened during the Duvalier regime, which lasted from the election of Francois “Papa Doc” Duvalier in 1957 until his son Jean-Claude “Baby Doc” Duvalier was ousted in 1987. Following decades of instability and a series of coups, the Duvaliers achieved thirty years of relative stability by centralizing state functions in Port-au-Prince under their direct control. They neutralized the military and other threats to their authority through the establishment of a nationwide—and personally loyal—paramilitary force, the Volunteers for National Security (VSN) popularly known as the *Tonton Macoutes*. In rural areas, authority was concentrated in the hands of the “*chef de section*,” an individual who was directly appointed by the president to perform all local functions from general administration, to judicial and police functions. The *chef de section*, along with all other members of rural communities, was informally supervised by the local VSN.<sup>57</sup> In this context, the judiciary served as another apparatus of control, both as a tool of state repression—often through the use of extortion and torture—and as a means to maintain informal networks of loyalty and control through the distribution of jobs to loyal supporters. Many judges and justices of the peace appointed on this basis lacked any knowledge of the law, and many were illiterate.<sup>58</sup> Meanwhile, most Haitians tended to agree with the sentiment expressed by one Haitian peasant, who lumped together “functionaries of the State (*leta*), doctors, lawyers, priests, pastors, *oun-gans* (Vodou priests), notaries, surveyors and the justice of the peace,” categorizing them all, and without reservation, as *volè*, or “thieves.”<sup>59</sup>

The fall of the Duvalier regime and the adoption of the 1987 Constitution were supposed to usher in democratic governance, peaceful political competition and the rule of law. Over the next two decades, Haitian citizens participated in several local and national elections, the army was disbanded, and a new civilian

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57. Pnina Lahav, *The Chef de Section: Structure and Functions of Haiti's Basic Administrative Institution*, in OCCASIONAL PAPERS NO. 4: WORKING PAPERS IN HAITIAN SOCIETY AND CULTURE, (Sidney W. Mintz ed., Antilles Research Program at Yale University 1975).

58. DECOSSE & ROTH, *supra* note 12, at 6.

59. LOUIS HERNES MARCELIN & PIERRE-MICHEL FONTAINE, SOCIETAL DYNAMICS AND FRAGILITY IN TODAY'S HAITI 19 (Interuniversity Institute for Research and Development [INURED] ed., 2011).

police force was established. Despite these trappings of democracy, however, the concentration of power persisted and fueled the continued use of the justice system to maintain exclusive authority.

Rather than fostering peaceful competition and constructive opposition, two decades of transition gave rise to zero-sum competition among political elites representing two highly segmented and polarized social classes. Haitian elections have been the setting for repeated episodes of political violence. From 1987 until 2010, Haiti did not experience a peaceful electoral transition from one party to another, and each set of elections was marked by violent intimidation, accusations of electoral fraud, and external pressure.<sup>60</sup> After Haiti's first democratic elections were aborted by violence in 1987, the first popularly elected presidency of Bertrand Aristide, which began in 1991, was interrupted by a violent coup after only seven months. Following contested elections that brought Aristide back to power in 2000, another round of violence resulted in Aristide's flight from the country and the establishment of a transitional administration backed by international peacekeepers but dominated by Aristide's political opponents. Violent political competition played out in the streets of Port-au-Prince over the subsequent two years, ending only after the reelection of Rene Preval to a second term in 2006. The 2012 elections resulted in a smoother transition, but were also overshadowed by the threat of violence.

During each of these transitions and subsequent administrations, the judiciary served successive ruling elites as they sought to achieve exclusive control over state institutions and economic assets in order to perpetuate their control at the national and local level. Most directly, in the context of violent political competition and limited space for peaceful opposition the judiciary has served to enable and legitimate repression of political opposition. Following the 1991 coup, the coup regime conducted a brutal campaign to repress political opposition, resulting in 2-3,000 deaths and over 100,000 refugees.<sup>61</sup> Abuses declined substantially following the end of the coup and Aristide's return to power in 1991, but Aristide was accused of using armed groups to intimidate rivals and using the courts to legitimate abuses, especially during his second term. International observers from the Inter-American

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60. DANIEL P. ERIKSON, HAITI, FREEDOM HOUSE: COUNTRIES AT THE CROSSROADS (2010), available at <http://freedomhouse.org/report/countries-crossroads/2010/haiti>.

61. DeCosse & Roth, *supra* note 12, at 14.

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Commission on Human Rights found that “certain judges and magistrates have been pressured by authorities, by gangs or violent and sometimes armed groups seeking to influence the outcome of certain cases, particularly when they are dealing with politically charged matters.”<sup>62</sup> The interim government of 2004-2006, which was dominated by Aristide’s political opponents, was similarly accused of manipulating the judicial process against Aristide supporters and in favor of his opponents.<sup>63</sup> One of the more notorious judicial decisions during that period—the reversal of the landmark conviction of former military and paramilitary leaders in connection with the 1994 Raboteau Massacre—highlighted the judiciary’s tendency to shift with the political tides.<sup>64</sup> Both the conviction and its reversal are emblematic of a far broader set of cases, including the Les Cayes and Duvalier cases described above, in which decisions appeared to be driven—or at least not blocked—according to the political expediencies of the ruling elite.

The judiciary also evolved in the absence of organized or effective political parties and constituencies as parties and factions have sought to maintain exclusive power. Following the end of the authoritarian Duvalier regime and the opening for democracy, local associations known as the *Organizations Populaires* (OPs) emerged to channel public participation in the newly opened democratic process. Yet these groups never fully coalesced into democratic political parties or interest groups that could coordinate interests or translate them into coherent positions. The military regime of 1991-94 violently suppressed these organizations as it sought to “systematically . . . eviscerate all civic, popular and professional organizations opposed to [the government’s] authoritarian rule.”<sup>65</sup> After his return to power, Aristide did not build formal political party structures and instead reached directly to the masses through informal links to the local leaders who had

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62. Press Release, Inter-Am. Comm’n H. R., Organization of American States, Press Release No. 24/03 (Aug. 22, 2003), *available at* <http://www.cidh.org/comunicados/english/2003/24.03.htm>.

63. Press Release, Inter-Am. Comm’n H. R., Organization of American States, Press Release No. 19/04, (Sept. 7, 2004), *available at* <http://www.cidh.org/comunicados/english/2004/19.04.htm>.

64. AMNESTY INTERNATIONAL, HAITI: OBLITERATING JUSTICE, OVERTURNING OF SENTENCE FOR RABOTEAU MASSACRE BY SUPREME COURT IS A HUGE STEP BACKWARD (May 26, 2005).

65. HUMAN RIGHTS WATCH, WORLD REPORT 1994: HAITI (1994), *available at* [http://www.hrw.org/reports/1994/WR94/Americas-06.htm#P330\\_164164](http://www.hrw.org/reports/1994/WR94/Americas-06.htm#P330_164164).

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been active in opposing the military regime.<sup>66</sup> His party fragmented following the end of his first term, leading to a proliferation of political parties and informal political networks, and setting the stage for the disputed elections of 2000.<sup>67</sup> The groups opposed to Aristide, including private sector interests, former military leaders, and members of the former ruling elite, similarly cultivated networks outside formal party or interest group structures. During the last two national elections, over sixty political parties participated,<sup>68</sup> most of them dominated by individual leaders with no organized constituency or discernible policy platform.<sup>69</sup>

In this context, politicians have maintained their authority by cultivating informal networks of loyal supporters rather than formal alliances with parties and interest groups, and used the compliant judiciary to perpetuate these networks. A pliable judiciary has permitted elites to maintain local monopolies over economic activities, and to edge out rivals by manipulating the police and courts. Business leaders exploit informal ties with politicians to skew judicial processes in order to monopolize business interests.<sup>70</sup> Economic monopolies enable elites to maintain their authority by distributing jobs and access to financial opportunities in exchange for political support. The members of these groups, in turn, work to secure votes for their patrons, sometimes using violence and intimidation.<sup>71</sup>

The weakness of the judiciary has also enabled politicians to transfer land to loyal followers, often through extra-legal means. Despite competing claims, those affected have little recourse to

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66. Fatton, *supra* note 56, at 123.

67. See, e.g., Daniel Erikson, *The Haiti Dilemma*, X-2 BROWN J. OF WORLD AFF. 285, 287 (2004).

68. See Haiti's Provisional Electoral Council, <http://www.cephaiti2010.org/index.php>.

69. Erikson, *supra* note 60, at 6.

70. The 2009 *Index of Economic Freedom* awarded Haiti one of the lowest possible scores for property rights, noting that "protection of investors and property is severely compromised by weak enforcement, a paucity of updated laws to handle modern commercial practices, and a dysfunctional and resource-poor legal system . . . most commercial disputes are settled out of court if at all." THE WALL STREET JOURNAL & THE HERITAGE FOUNDATION, THE 2009 INDEX OF ECONOMIC FREEDOM (2009), available at <http://blog.heritage.org/2009/01/13/the-2009-index-of-economic-freedom/>.

71. Philippe Tremblay, *Haiti A Bitter Bicentennial: Report of a Mission by Rights & Democracy* 14 (Rights & Democracy 2004), see also ROBERT MUGGAH, SECURING HAITI'S TRANSITION: REVIEWING HUMAN INSECURITY AND THE PROSPECTS FOR DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION, GRADUATE INSTITUTE OF INTERNATIONAL STUDIES, GENEVA, SWITZERLAND, THE SMALL ARMS SURVEY 2 (2005); For a detailed account of electoral violence in Haiti, See *Rapport d'enquete sur le deroulement des elections*, Institut Mobile d'Education Démocratique IMED (2009).

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challenge the seizures. Only a single specialized land court exists in the country, in the volatile Artibonite region, and two out of the three judge positions on that court remained empty for much of the last decade. The weakness of the land registry system—only an estimated five percent of land is officially registered—has enabled numerous overlapping land claims.<sup>72</sup> Violence between rival groups has at times erupted over land grabs by well-connected elites—often seized with the permission of their patrons in exchange for political service.<sup>73</sup> Local rivalries over land, jobs and business interests have sometimes been coopted by larger political forces and erupted into political violence.<sup>74</sup> The judicial system has largely been unable to resolve these disputes, allowing powerful political patrons to allocate and transfer control over land and other economic assets at will.

Perhaps even more importantly, the weakness of the local judiciary has allowed influence over elections. Influence over the appointment of local prosecutors and judges enables local politicians to influence the resolution of electoral disputes and organize violent intimidation with little consequence to the perpetrators.<sup>75</sup> The ability to influence electoral outcomes in turn has enabled local politicians to appoint local officials, thereby entrenching control at the local level and making them indispensable to national politics. This system of local control has affected national-level electoral results as national level politicians have relied on local clients to mobilize their communities during elections.

Given the judiciary's importance to maintaining authority at the national and local levels, political forces have constrained the space available for reforms to the structure, organization and legal framework governing the justice sector. Once in power, no political leader has allowed the judiciary to develop in ways that

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72. KEITH CRANE ET AL., BUILDING A MORE RESILIENT HAITIAN STATE 47-48 (RAND 2010).

73. For a recent example, see Victor Jean Junior, *Un Conflit Terrien Divise Ganthier*, LE NOUVELLISTE (June 21, 2010), available at <http://lenouvelliste.com/article4.php?newsid=80655>.

74. One of the most notorious instances of such violence occurred in St. Marc in 2004 when a contest over control of the lucrative port in St Marc between rival local groups – one aligned with the ruling Aristide government and the other aligned with its opponents – escalated to armed opposition and violent response by the police and other pro-government forces that led to the deaths of at least 27 people, many of them unarmed civilians. The “La Scierie massacre” was one of the major factors that contributed to the end of Aristide’s second term. See Anne Fuller, *A Propos du Massacre de la Scierie*, LE NOUVELLISTE, Apr. 9, 2005.

75. For a detailed account of electoral violence at the local level, See *Rapport d'enquete sur le deroulement des elections*, supra note 71.



might constrain the power of the executive to consolidate its control over the resources of the state or to limit opposition. Instead of putting in place legal constraints that might protect them when they are out of power, the members of each ruling party have tended toward consolidating control in order to keep their allies in power, sometimes hanging on through the use of violence or electoral fraud rather than risk losing their control of the state. In the absence of the necessary political space, efforts to promote judicial independence and legal reforms have stalled, leaving programs aimed at strengthening judicial performance through training or administrative changes mired in organizational dysfunction.

Where reforms have advanced, as in the adoption of the three laws favoring judicial independence in 2007, they have reflected a prevailing political opening. The three laws were adopted partly because of donor support that went far beyond technical assistance in providing financial support to advocacy groups and facilitating compromise among legislators.<sup>76</sup> The laws were also adopted in a period of relative stability and political inclusion, when President Rene Preval, following a period of violence and political tension, appeared to be seeking a “departure from the inherent winner-takes-all dialectics in Haitian politics” by engaging with elements of the political opposition.<sup>77</sup> After becoming mired in a political struggle that led to the fall of his government and nearing the next round of elections, Preval ultimately balked on the implementation of the three laws, which were never implemented during this term. His successor, President Michel Martelly, campaigned for improvements in the rule of law, and promised specifically to implement the three laws and establish the High Judicial Council in the first days of his administration. Yet he, too, encountered familiar problems as a deadlock between the executive and the opposition-dominated legislature stalled the formation of the government and fueled political tension.<sup>78</sup> When the High Judicial Council was finally established over a year into

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76. NCSC, *Haiti Judicial Strengthening and Stabilization Initiatives: Final Report X*, (2008) available at [https://www.conferences.state.gov/RM/programevaluation2011/Related%20Documents/Capacity%20Building%20Workshops/Measuring%20Stability\\_How%20Do%20You%20Know%20You%20Are%20Making%20Progress\\_Haiti%20Stabilization%20Initiatives%20Case%20Study.pdf](https://www.conferences.state.gov/RM/programevaluation2011/Related%20Documents/Capacity%20Building%20Workshops/Measuring%20Stability_How%20Do%20You%20Know%20You%20Are%20Making%20Progress_Haiti%20Stabilization%20Initiatives%20Case%20Study.pdf).

77. JOEL KELLENBERG & ANDREW DUNCAN, COUNCIL ON HEMISPHERIC AFFAIRS, HAITI'S CAUTIOUS IMPROVEMENT, BUT ARISTIDE QUESTION REMAINS UNANSWERED (2007), available at <http://www.coha.org/haiti%E2%80%99s-cautious-improvement-but-the-aristide-question-remains-unanswered/>.

78. ROBERT MAGUIRE, UNITED STATES INSTITUTE OF PEACE, PEACE BRIEF 131 (2012), available at <http://www.usip.org/files/resources/PB-131.pdf>.

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Martelly's term, it quickly became mired in a baldly political controversy over its nominations to the Permanent Electoral Council.<sup>79</sup> Although the High Judicial Council was eventually established, it began on a weak political footing and with limited capacity to fulfill its functions.

Influence on judicial outcomes and structure at the local and national levels has thus facilitated patterns of local and national level politics. The weakness of the judiciary—which remains under executive control and prone to manipulation—has enabled politicians to concentrate power at the local and national level. Given this set of priorities, the weak and politicized justice system has served little purpose for most Haitians in need of resolving disputes or crimes. They tend to encounter the system only when they run afoul of some powerful interest that seeks to use the judiciary in its favor. Meanwhile, reforms that would alter the structure, independence or legal framework and shift this balance have consistently stalled.

#### IV. THE LIMITATIONS OF FOREIGN AID TO THE HAITIAN JUSTICE SYSTEM

Within this context, the aid provided by external donors has had limited impact on the evolution of the justice sector. The justice system was the target of over \$75 million of foreign aid programs between 1993 and 2010, provided mostly by the United States, Canada, France, and the European Union, along with additional resources provided by the UN Development Program and UN Peacekeeping missions.<sup>80</sup> As described above, these donors have invested in a wide range of programs and projects aimed at addressing legal and organizational deficits through training, technical assistance, and equipment for judges and prosecutors. Their programs have pursued a variety of approaches, from increasing knowledge and skills through training, to setting up case registration and tracking systems, to refurbishing court-

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79. The High Judicial Council is constitutionally mandated to select three members of the Permanent Judicial Council. See *Haiti-Justice: New Step in the Crisis CSPJ/CEP*, HAITI LIBRE (Oct. 10, 2012), <http://www.haitilibre.com/en/news-6854-haiti-justice-new-step-in-the-crisis-cspj-cep.html>.

80. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/T-NSIAD-00-257, FOREIGN ASSISTANCE LACK OF HAITIAN COMMITMENT LIMITED SUCCESS OF U.S. AID TO JUSTICE SYSTEM 1 (2000). This amount does not include additional funds devoted to the police, including over \$100 million between 1993 and 2000, and additional funds since then. See Fortin and Pierre on police. See Isabelle Fortin & Yves-Francois, *Haiti et la Réforme de la Police Nationale*, THE NORTH-SOUTH INSTITUTE 13 (2008).

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houses, prosecutors' offices and ministry buildings. In many cases, these various approaches have been pursued simultaneously. For instance, a 2004 report commissioned by USAID included twenty-three sets of recommendations, ranging from the overhaul of legislation and procedures as well as the establishment of new administrative procedures, to the reform of legal, judicial education, training, and expansions of legal aid services.<sup>81</sup> Yet few of these efforts have translated into sustained changes.

Critics have sought to explain the failure of so many years and millions of dollars of assistance by pointing to insufficient coordination among donors and inappropriate interventions. Several accounts have emphasized insufficient coordination among multiple donors with different approaches to judicial reform.<sup>82</sup> Lack of agreement about basic principles and structures has led to conflicting recommendations that differ according to a donor's legal tradition, and which sow confusion rather than facilitate reform. The lack of coordination has also led to imbalances among various parts of the justice system, including much higher levels of resources devoted to the police than to the judiciary or prison system. Assistance has been fragmented and intermittent, often stopping and starting in response to political changes. Each time a program has ended or priorities have changed, fragile investments have largely collapsed and disappeared, forcing the next round of aid implementers to begin the same projects anew. For example, the *Ecole de la Magistrature*, which was established in 1994 with Canadian, French and U.S. funding and credited with training a "new breed" of judges and prosecutors, shut down for over six years in the midst of legal uncertainty and political turmoil.<sup>83</sup> Efforts to re-start the program in 2010 were forced to reconstruct the building and recreate the curricula.<sup>84</sup>

Another line of critique has focused on the inappropriateness of donor reform strategies to the local context, in proposing models

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81. See generally National Center for State Courts, *supra* note 31, at 10-12.

82. See Susan Beidas et al., *Justice and Security Reform After Intervention: Haiti in* CHARLES CALL, *CONSTRUCTING JUSTICE AND SECURITY AFTER WAR* 69, 92 (U.S. Inst. of Peace Press 2007).

83. *Id.*

84. In 2010, the French government and UNDP sponsored a 10-month training of 20 Haitian magistrates in France's national judicial training school (*Ecole Nationale de la Magistrature*) in Bordeaux, France. Upon their return, the school provided some additional training. *Nouveaux Magistrats Viennent Renforcer le Systeme Judiciaire Haitien*, PNUD (May 28, 2012), <http://www.undp.org/content/haiti/fr/home/press-center/articles/2012/05/28/vingt-nouveaux-magistrats-viennent-renforcer-le-syst-me-judiciaire-ha-tien/>.

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based on their own countries rather than Haitian realities.<sup>85</sup> A USAID evaluation report, for example, faulted one of its programs for failing to conduct an appropriate “needs analysis” and instituting generic case management processes rather than building on existing ones.<sup>86</sup> Donors have also been faulted for “overly optimistic presumptions” regarding the impact of external resources along with “little consideration of absorptive capacity or measure of the true interest in change.”<sup>87</sup> As a result, much of the aid money has not been spent, while proposed procedures, techniques and skills have not been adopted.

Underlying all of these critiques has been a fundamental miscalibration of aid programs to the local reality, and particularly the political context. On the one hand, donors have recognized the role of political pressures in blocking their attempts to put in place new laws, procedures and structures. In 2000, a report by the U.S. General Accounting Office (GAO) concluded that “the Haitian government’s lack of a clear commitment to addressing the major problems of its police and judicial institutions has been the key factor affecting the success of the U.S. assistance provided to these institutions.”<sup>88</sup> The Canadian government similarly justified its decision after 2000 to “terminate most of its support to public institutions, especially in the area of security and justice” as a result of “the Haitian government’s lack of political will to reform the public sector as a whole and improve all forms of governance.”<sup>89</sup> Although donors have occasionally shifted their approaches or delayed programs in response to political changes, their responses have rarely demonstrated an understanding of the political dynamics that have shaped these obstacles. They have tended to pursue the same types of programs focused on addressing the same legal and organizational deficits without addressing the underlying political issues. Donors’ assessment of “political will” has tended to focus on the perceived commitment of individual decision-makers to a particular reform despite frequent changes among high-level officials. They have devoted much less

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85. RICHARD HUNTINGTON ET AL., UNITED NATIONAL DEVELOPMENT PROGRAMME (UNDP) OUTCOME EVALUATION: RULE OF LAW, JUSTICE AND HUMAN RIGHTS, at 2, 18 (Aug. 29, 2003).

86. NCSC (2006), *supra* note 7, at 37.

87. HUNTINGTON ET AL., *supra* note 85, at 20.

88. JESS T. FORD, LACK OF HAITIAN COMMITMENT LIMITED SUCCESS OF U.S. AID TO JUSTICE SYSTEM, 5, 8 (Sept. 19, 2000).

89. CANADIAN INTERNATIONAL DEVELOPMENT AGENCY, CORPORATE EVALUATION OF THE CANADIAN COOPERATION PROGRAM IN HAITI (1994-2002): SUMMARY REPORT 9 (May 2003).

attention to the conditions that make certain institutions possible and the actions needed to make reforms sustainable.

In some cases, donors have contributed to the conditions that undermine the impact of their efforts. In a context in which the drive to centralize authority has undermined incentives for building an independent or credible judiciary, donor aid has also been highly concentrated, focused primarily on the executive branch. As one observer noted, aid to the justice system has been “dependent on the goodwill of the minister of justice,” of which there have been seventeen between 1994 and 2011.<sup>90</sup> Although donors have occasionally provided training or financial assistance to other actors, including the bar association, non-governmental organizations, and even the judiciary, political support has been temporary, short-term and insufficient for fledgling groups to become organizationally or financially sustainable.<sup>91</sup> Meanwhile, decisions on whether or how to engage have largely ignored the perspectives of those within and outside the judicial system who were trying to promote reforms, leaving the pace of reforms in the hands of the members of the executive who are least likely to have political reasons to support them.

Donor funding to the justice sector has also tended to concentrate resources in urban centers, and primarily in Port-au-Prince. As described above, the roots and manifestations of concentrated authority, as well as the incentives to manipulate the judiciary, are most clearly evident at the local level. Among the numerous reports produced by donors on Haitian law, procedure, and institutional structure, however, few have attempted to analyze local dynamics of justice either in urban or in rural areas of the country. Amidst the focus on legal and institutional deficits, analysis of the nature of public demands for justice and dispute resolution, the sources of grievance and dispute, and the performance of other, non-judicial systems of dispute resolution has been neglected. A few surveys have pointed to sharp differences between rural and urban areas in the type of disputes and grievances that are relevant to citizens, as well as the ways in which

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90. Tremblay, *supra* note 71.

91. Efforts to support civil society in support of justice reform include a USAID program implemented by IFES in 2000-2003, and a UNDP program called the Forum Citoyen supported by UNDP from 2004 to 2007 for \$1.3 million. According to an evaluation of the latter program, it resulted in limited impact on policy due to confrontational relationship. ALEXANDRE RICHELIEU, UNDP, EVALUATION DU PARTENARIAT PNUD-FORUM CITOYEN POUR LA REFORME DE LA JUSTICE EN HAÏTI: RAPPORT DE MISSION (July 2008).

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disputes are handled. While urban residents are concerned about crime and physical security, residents of rural areas—where sixty percent of the population resides—tend to report concerns and disputes around natural resources, including land and water.<sup>92</sup> In both settings, courts tend to play an extremely limited role in resolving disputes.<sup>93</sup> The role of courts and law enforcement officials is more commonly perceived to focus on reinforcing exploitative patterns of authority rather than enabling fair or credible resolution of disputes. Nonetheless, most donor programs focused on “access to justice” have mostly been limited to providing legal aid for criminal defense with little attention to civil disputes, assistance for victims, or other forms of dispute resolution.<sup>94</sup> Donors have exhibited little understanding of how support for justice sector or local government actors might affect local patterns of authority and their implications for equitable resolution of disputes. At best, aid to the justice system has been mostly irrelevant for most Haitians, and at worst it may have reinforced exploitative patterns of authority.

#### V. CONCLUSION: TOWARD A NEW ROLE FOR INTERNATIONAL SUPPORT TO THE HAITIAN JUSTICE SECTOR

The evolution of the justice system in Haiti remains complex and uncertain, driven by numerous factors that lie beyond the control of any one actor, especially development agencies and donors from outside the country. Considerable uncertainty remains regarding how judiciaries evolve across countries, and when they are likely to move toward increased credibility, inde-

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92. Hauge et al. found that perceptions of insecurity were much higher in urban than rural areas, with conflicts in rural areas resulting primarily from land disputes and election, and conflicts in urban areas more focused on politically motivated violence. A survey conducted by the World Bank found that while 58% of residents of Port-au-Prince feel unsafe “often or most of the time,” in rural and other urban areas only 15% of residents feel unsafe. WORLD BANK COUNTRY SOCIAL ASSESSMENT: SOCIAL RESILIENCE AND STATE FRAGILITY IN HAITI, 32 (Apr. 27, 2006), *available at* <http://site.resources.worldbank.org/EXTSOCIALDEV/Resources/3177394-1168615404141/SocialResilienceandStateFragilityinHaiti-ACountrySocialAnalysis.pdf>.

93. In a survey conducted in St. Marc, Gonaives and La Chapelle, Hauge et al. found that people rarely turned to state institutions to resolve disputes; but when they did, they preferred the police over the courts due to its efficiency, regardless of the type of dispute. Wenche Hauge et al., *Conflict Prevention in a DDR Context in Haiti*, 2008 INT’L PEACE RESEARCH INST. OSLO (PRIO); *see also* The WORLD BANK COUNTRY SOCIAL ASSESSMENT, *supra* note 92 at 8, 63.

94. A couple of recent examples are programs funded by Canada and USAID, which assisted people in securing civil status documentation after the earthquake, but these have been limited in scope and duration.

pendence and effectiveness. Nonetheless, the structure and performance of justice systems clearly reflect political and social conditions particular to each country. The evolution of the Haitian justice system, the challenges it faces in addressing citizen needs, and the failure of most reform efforts, cannot be understood without an examination of the social and political conditions in which it has developed. In this article, I highlight one set of factors that has affected the Haitian justice system over the last two decades. The legacy of a repressive and predatory state, combined with a persistent tendency by political and economic elites to concentrate political authority, exclude opposition and organized interest groups, and rely on informal networks to maintain power have limited the space for an independent or credible judiciary to emerge. Instead, decision-makers at all levels have blocked or delayed efforts to strengthen the judiciary or constrain executive power in order to maintain existing patterns of political control. In these conditions, donor-funded projects have produced new laws, procedures, practices and skills, but few of these have been implemented or sustained.

Although these challenges appear daunting to the prospect of more credible justice institutions that could respond to the needs of Haitian citizens, they do not necessarily close off the possibility for more effective or sustainable approaches. The conditions laid out above are far from monolithic, and examples exist in which reforms have advanced and more effective institutions have emerged. Investigating such examples of “positive deviance” can provide the basis for more sustainable approaches to fostering credible justice institutions in Haiti.<sup>95</sup> For example, examining the conditions that allowed the passage of the judicial independence laws in 2007 and the establishment of the High Judicial Council in 2012 can provide clues to the political shifts—such as incentives to reach out to opposition or respond to certain constituencies—that might favor reform. The efforts of donors to go beyond technical assistance in mobilizing broader support for the passage of the laws may also generate valuable lessons. Similarly, examining the conditions surrounding the Les Cayes trial, such as the

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95. Looking for examples of “positive deviance” is a major component of the “problem-driven iterative adaptation” approach proposed by Andrews et al., *infra*, which also includes gathering evidence to facilitate learning, and engaging a broad set of agents and stakeholders. See Matthew Andrews et al., *Escaping Capability Traps Through Problem Driven Iterative Adaptation*, 8, 13–14 (United Nations University World Institute for Development Economics and Research, Working Paper No. 2012-/64, 2012).

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involvement of independent Haitian institutions and the scrutiny of external actors, might elucidate other factors that have enabled fair and credible judicial decisions in the Haitian context. Such an approach requires looking beyond the specific laws and institutions that affect judicial performance to the conditions that shape them, and to remain open to alternative forms of institutions and approaches to supporting change that go beyond the usual legal or institutional fixes. It may also require engaging on a sustained and lasting basis with groups—both within and outside the state—that can mobilize support and make change possible, even if the eventual institutional or legal outcome may not have been expected.

Supporting more credible and responsive justice in the Haitian context may also require more engagement at the local level, where the core of judicial politics plays out. In Haiti, as elsewhere, local politics are central to national politics and vice versa, particularly as they relate to the role of the judiciary. Local politics may also be more tractable, and allow greater space for groups outside entrenched power structures to influence outcomes. Looking closely at justice issues in rural or marginalized urban areas may also reveal alternative modes of dispute resolution that are more conducive to fair and credible dispute resolution. Haiti is actually quite peaceful by regional standards, with extremely low levels of crime despite widespread poverty and scarcity.<sup>96</sup> This suggests the presence of effective and credible mechanisms to resolve at least certain types of disputes. Engaging at this level therefore requires deeper knowledge of local grievances, capacities and relationships and how they interact. Donors can begin by investing in research that elucidates the types of conflicts and grievances that fuel demand for justice in different areas of Haiti, the varieties of existing dispute resolution mechanisms, their interface with state judicial and law enforcement institutions, and their relationship to local and national structures of power and influence. Such research can be conducted by local organizations that are embedded in communities and familiar with the context. It can help point toward issues like land, housing and water that have been largely neglected by external donors yet may be crucial to exper-

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96. According to the UN Office on Drugs and Crime (UNODC), Haiti's homicide rate in 2010 was 6.9 per 100,000 inhabitants, compared to 52 in Jamaica, 35 in Trinidad, 28 in the Bahamas, 66 in El Salvador, and 24 in the neighboring Dominican Republic. The homicide rate for the U.S. was 5 per 100,000 inhabitants in 2010, only marginally lower than Haiti's. See U.N. OFFICE ON DRUGS AND CRIME, 2011 GLOBAL STUDY ON HOMICIDE 93 (2011).



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iences of justice. Deeper knowledge of local context can also point to spaces in which more credible and fair justice is possible, and to the types of engagements with actors within and outside the state that might help strengthen capabilities for fair and credible justice.

Engaging in a way that is more sensitive to national and local political conditions is neither simpler nor politically neutral. It raises new questions and dilemmas about the appropriate role for external assistance. Donors must be prepared to invest in deeper local knowledge, in moving beyond the volatility of short-term approaches and invest in longer-term engagements with broader sets of actors. Although perhaps far afield from the technical programs that have dominated assistance so far, such approaches may be the crucial building blocks for a more sustainable approach.